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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1021**

In re the Marriage of:
Kelly Elizabeth Bennett, petitioner,
Appellant,

vs.

Joseph Arnold Bennett,
Respondent,

Judith Leske,
Respondent.

**Filed May 8, 2017
Reversed
Ross, Judge**

St. Louis County District Court
File No. 69DU-FA-14-641

John N. Phung, Legal Aid Service of Northeastern Minnesota, Duluth, Minnesota (for appellant)

Joseph A. Bennett, Duluth, Minnesota (pro se respondent)

Judith Leske, Duluth, Minnesota (pro se respondent)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and
Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

Respondent Judith Leske moved for grandparent visitation with Appellant Kelly Bennett's two children. The district court informed the parties that it intended to hold an evidentiary hearing on the motion, but it instead awarded grandparenting time to Leske without an evidentiary hearing, concluding that Bennett did not dispute that the award is in the children's best interests and the visitation would not interfere with the parent-child relationship. We reverse the order because Leske failed to make a prima facie showing on these essential elements and because Bennett indeed disputed them.

FACTS

Kelly Bennett ("Mother") and Joseph Bennett ("Father") divorced in June 2015. During their dissolution proceeding, their two daughters, M.B. and L.B., were the subjects of a separate child-protection proceeding. The district court judge presiding over the dissolution proceeding deferred to the child-protection proceeding as to the custody of the children. The district court eventually granted Mother physical and legal custody.

Father's mother, Judith Leske, moved the district court for an order for grandparenting time under Minnesota Statutes section 257C.08 (2016). Leske's motion included her affidavit, which stated that the family once lived with her for several months. It also stated that M.B. visited her almost every weekend since moving out until Mother and Father separated, when Mother refused to let the children visit her.

Mother opposed Leske's motion. Mother's response also included an affidavit. In it, she stated that she and Father had lived with Leske for "about a year total" before and

after the oldest child was born, but that Leske had “not had much recent involvement with the children and does not have a relationship with them” despite having been given the opportunity to have one. The affidavit declared that she and Father had a “rocky” past and that Leske repeatedly involved herself in the couple’s disputes. It stated that despite Father’s being prohibited by the district court from having contact with the children, Leske took the children to her home where Father resided. It also stated that Leske’s inaccurate description of where she would be with the children resulted in a search for the children in a movie theater and that social services staff determined that it was not in the children’s best interests for Leske to take the children “due to Ms. Leske’s poor decision making.” The affidavit also stated that Father continued to abuse drugs and lived with Leske, resulting in “an unsafe environment[] in [Leske’s] home.”

Mother and Leske (but not Father) appeared for a hearing on Leske’s motion. Leske explained the movie-theater-search incident. She responded to concerns about Father’s contact with the children and his continued residence in her home by offering that her time with the children “could be anywhere” and that she understood that Father was prohibited from being near them.

Mother, through counsel, discussed Mother’s previous lifestyle difficulties and argued that she needed to avoid being pulled “back into the system that [she was] trying to avoid.” She argued that the district court should deny the motion because Leske still lived with the children’s violent and chemically dependent father and that based on prior circumstances Leske could not be trusted to spend her grandparenting time away from Father.

The district court inquired about Leske's prior visits with the children as follows:

Q: So, Ms. Leske[], he's telling me that the only two times you had the kids, you screwed up on both times?

A: No, that's not true, Your Honor.

Q: Since this CHIPS proceeding happened, how many times --

A: No, that's not true, either.

Q: Okay. So tell me what other visits you had.

...

A: Went to the circus, brought them to the -- to see the princesses, brought them to the rodeo, brought them swimming, brought them to Edgewater, and brought them to [McDonald's].

Q: All during the CHIPS proceeding?

A: I believe it was.

Mother argued through counsel, "Further, we question Ms. Leske[]'s judgment. She is -- she has her son living with her who . . . was using narcotics in the home." The district court raised the option of visitation away from Leske's home, and counsel responded: "It's [Leske's] judgment. She hasn't made good decisions."

The district court then had the following exchange with Mother's counsel:

Q: All right. I'm going to give you one more opportunity. . . . You have yet to tell me what having supervised visits at the Visitation Center would do to, that would not put -- that would put the children in a position where they're not safe or not protected. . . . So, what about the Visitation Center would be a problem?

A: And, Your Honor, and certainly I'm not saying the kids wouldn't be safe at the Visitation Center, but what I'm saying is that the statute provides that it's [Leske's] burden to show it's in the [children's] best interest for her to have visits.

The district court announced, “All right. Well, I can tell you that I am going to issue an order. I am going to provide for supervised visits at the Visitation Center. . . . I will also be setting an evidentiary hearing”

Mother then had the following unsworn direct exchange with the district court:

MOTHER: I’ve never denied [Leske’s] rights to come up and see the children at my mom and dad’s house, and that was still the understanding. And I don’t understand why that’s not just being in play, and continue down that road

COURT: So what I’m hearing is that you don’t have any problem with her seeing your kids?

MOTHER: At a secured location that we as in CHIPS court and everything have already dissolved in the CHIPS matter, which was --

COURT: And that’s exactly what I’m talking about, Ms. Bennett.

MOTHER: -- at my mom and dad’s house. That was already discussed, that it would be at my mom and dad’s house.

COURT: And, obviously, that’s not working, so we’re going to do it somewhere that’s a more neutral location.

MOTHER: She’s not made contact in several months.

COURT: We’re going to do it in a more neutral location.

MOTHER: That was [a] neutral location.

COURT: I’ve heard enough, Ms. Bennett. This is the neutral location where they’re going to be now.

The district court concluded the hearing by telling the parties that it would “see [them] all back at [the] pre-trial and then the trial date. But in the meantime, once a month for a couple hours.”

But the district court did not wait for an evidentiary hearing before deciding the motion. The next day it issued an order granting Leske’s motion for grandparenting time. In relevant part, the district court found that: Leske had been involved with the children;

Mother said Leske could visit the children at Mother's parents' home; Mother's counsel had no answer as to whether visitation was in the children's best interests; there was "no dispute" as to grandparent-visitation being in the children's best interests; visitation with Leske was in the children's best interests; visitation would not adversely affect the parent-child relationship; and, "[a]s there are no facts in dispute, the Court will not hold an evidentiary hearing."

The district court awarded Leske grandparenting time "of at least two hours per month commencing immediately" with visits increasing to twice monthly beginning in July 2016. It elaborated, "At the motion hearing, [Mother] stated that [Leske] can visit with the children whenever she wants to do so. Therefore, there is no dispute that visitation is in the best interest of the children and that it does not interfere with the parent-child relationship."

Mother appeals.

D E C I S I O N

Mother challenges the district court's order granting Leske grandparenting time under Minnesota Statutes section 257C.08. Under the common law and the Constitution, "[a] parent has the fundamental right to make parenting decisions, including deciding who spends time with the child." *In re C.D.G.D.*, 800 N.W.2d 652, 655–56 (Minn. App. 2011), review denied (Minn. Aug. 24, 2011) (citing *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995) (citing common-law precedent and observing that "[h]istorically, grandparents had virtually no legal right to maintain a relationship with a grandchild independent of the wishes of the child's parents")); *Troxel v. Granville*, 530 U.S. 57, 66–68, 120 S. Ct. 2054, 2060–61 (2000) (plurality) (holding that grandparent visitation must satisfy the due process

protection in the fundamental right of parents to make decisions concerning the care, custody, and control of their children); *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (“[A] parent’s right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right.”).

The legislature has carved a grandparent-visitation exception out of the common-law rule that parents may prohibit their child’s association with others. *See* Minn. Stat. § 257C.08, subd. 2. We review the district court’s visitation decision for an abuse of discretion, asking “whether the court made findings unsupported by the evidence or improperly applied the law.” *SooHoo*, 731 N.W.2d at 825. We will reverse the district court’s findings if they are clearly erroneous. *Id.* “A finding is clearly erroneous if we are left with the definite and firm conviction that the court made a mistake.” *Id.*

The district court may grant a grandparent visitation to a child only if it finds that granting visitation is in the best interests of the child and that the visitation will not interfere with the parent-child relationship. Minn. Stat. § 257C.08, subd. 2. The second element—that grandparent visitation will not interfere with the parent-child relationship—is an element that the grandparent must prove by clear and convincing evidence. *SooHoo*, 731 N.W.2d at 823; *In re C.D.G.D.*, 800 N.W.2d at 656, 662.

Mother argues that the district court abused its discretion by awarding visitation despite Leske’s failure to present a *prima facie* case that would justify even an evidentiary hearing, by awarding grandparent visitation in the face of factual disputes, and by disregarding Mother’s due process right not to have grandparent visitation imposed without an evidentiary hearing. We need only address two of these arguments.

Prima Facie Case for Visitation

Mother accurately asserts that Leske did not establish a prima facie case for visitation. We have held that Minnesota Statutes section 257.022, subdivision 2b (Supp. 1989), the predecessor to section 257C.08, required a prima facie showing of each statutory element for third-party visitation before warranting an evidentiary hearing. *Kulla v. McNulty*, 472 N.W.2d 175, 184 (Minn. App. 1991), *review denied* (Minn. Aug. 29, 1991). The district court did not expressly find that Leske established a prima facie case by showing that grandparent visitation is in the children's best interests and that it would not interfere with the parent-child relationship. But the finding is implied by its promise to schedule an evidentiary hearing. Leske's motion and affidavit establish only that Leske is the children's grandmother. The closest she came to establishing either element was her urging to the district court that her absence might mislead the children to think she does not care for them. This does not bear on the children's best interests or whether Leske's visitation would interfere with Mother's relationship with the children. Without Leske's alleging that visitation would both be in the children's best interests and not interfere with the parent-child relationship, the district court had no ground to order an evidentiary hearing, much less to award visitation without a hearing. We also address Mother's additional argument that the district court awarded visitation wrongly in the face of fact disputes.

Ordering Grandparent Visitation Despite Disputed Facts

The district court concluded that there was "no dispute" that grandparent visitation was in the children's best interests and that visitation would not interfere with the parent-

child relationship. We agree with Mother's contention that these conclusions rested on confusion over the court's exchange with counsel and that the conclusions contradict the disputed facts reasonably construed in Mother's favor.

Mother accurately contends that the district court mischaracterized her counsel's best-interests statements to hold that "there is no dispute that visitation is in the best interest of the children." The district court asked Mother's counsel to explain how visitation would "put the children in a position where they're not safe or not protected." Mother's counsel responded by reminding the court that the issue is the children's best interests. The district court found that visitation was in the children's best interests based on its reasoning that Mother's counsel "had no response" to the court's inquiry about why visitation with Leske was not in the children's best interests. Given the context of Leske's failure to show or explain how (let alone meet *her* burden to prove by clear and convincing evidence that) grandparent visitation is in the children's best interests, the district court's rationale and findings indicate that it mistakenly put the burden on Mother to disprove that grandparent visitation would meet the children's best interests. And Mother's counsel had already emphasized Mother's concern about Leske's "poor judgment." Mother indeed disputed whether visitation was in the children's best interests.

We see other factual issues bearing on whether or to what extent grandparent visitation should be ordered. For example, Mother disputed the amount of personal contact Leske previously had with the children. The record shows that Mother maintained that there were only two relevant instances of Leske's contact with the children, while Leske said there were more. We need not address Mother's argument that the district court

improperly ignored or discredited her affidavit; suffice it to say, the affidavit highlighted a disputed fact. And given that this disputed fact bears on a statutory circumstance that must be weighed before awarding visitation, the dispute was material.

Another fact dispute centers on whether visitation will impact the parent-child relationship. The district court seems to have relied on Mother's unsworn statements as her admission that visitation would not adversely affect her relationship with the children. The district court found, "[Mother] stated at the hearing that Ms. Leske can see the children whenever she wants to so long as she does so at [Mother's] parents' home." That summary is not the only or even the most reasonable way to interpret Mother's exchange with the court, and it seems to stretch all ambiguities against Mother. Mother correctly points out that her comments during the exchange were not sworn and that her sworn affidavit includes facts that establish a material dispute. More important to us is the context; the exchange occurred after the district court had already declared that it would temporarily allow visitation and that it would finally decide the visitation motion after an evidentiary hearing. A fact finder might therefore reasonably construe Mother's unsworn statements to address only that period. That is, her comments could be taken as her urging that, during the pre-evidentiary-hearing period of temporary visitation (visitation that Mother opposed), Leske's visitation should occur only in the home of Mother's parents. Even if the exchange were truly a concession about a potential visitation award after the temporary period, Mother's statements could be construed as addressing only the location of visitation, not the propriety of visitation generally. That is, she may have been addressing only the district court's choice to require visitation at the Visitation Center rather than at Mother's parents'

home, which had been the prior arrangement. The context of the exchange makes either of these constructions reasonable, and neither of them concedes the element in the way the district court seems to have concluded.

Conclusion

Leske failed to make a prima facie case requiring an evidentiary hearing on her motion for grandparent visitation. She consequently also failed to introduce clear and convincing evidence warranting an award of grandparent visitation without any evidentiary hearing, where disputed material facts could have been resolved. Because we hold that the district court abused its discretion by awarding visitation on an inadequate showing, we do not consider Mother's due-process argument. We reverse the district court's order awarding grandparent visitation.

Reversed.